

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 27, 2007 Session

**SANDRA YEVETTE TURNER, as next friend, next of kin, natural mother,
and personal representative of JESSICA JOVAN TURNER, deceased v.
STERILTEK, INC., THE VANDERBILT UNIVERSITY d/b/a
VANDERBILT UNIVERSITY MEDICAL CENTER, HERBERT S.
SCHWARTZ, M.D., ED GLENN, M.D., and JOHN/JANE DOE**

**An Appeal from the Circuit Court for Davidson County
No. 03C-1977 Barbara N. Haynes, Judge**

No. M2006-01816-COA-R3-CV - Filed December 20, 2007

This appeal involves negligence and medical malpractice. The defendant corporation does off-site sterilization of surgical instruments for the defendant medical center. On July 12, 2002, the defendant physicians were performing surgery on the plaintiff's daughter at the defendant medical center, using instruments sterilized by the defendant corporation. During the surgery, an agent of the corporation informed the physicians that some of the instruments they were using might be contaminated. After receiving this information, the physicians stopped the surgery before it was completed. As a result, the plaintiff's daughter had to return to the medical center at a later date, at which time the defendant physicians successfully completed the necessary surgical procedure. The plaintiff filed this lawsuit against the corporation, the medical center, and the physicians, seeking damages for alleged negligence and medical malpractice. The defendants filed motions for summary judgment supported by expert affidavits. The trial court granted the defendants' motions for summary judgment on all claims. The plaintiff appeals. We affirm in part and reverse in part. We affirm the trial court's grant of summary judgment as to the plaintiff's claims against both of the defendant physicians and, accordingly, as to the plaintiff's claim that the defendant medical center is vicariously liable for the actions of the physicians. We also affirm the grant of summary judgment as to the plaintiff's claim against the defendant corporation for failure to provide sterilized instruments and batteries, and as to the plaintiff's claim as a third-party beneficiary to the contract between the corporation and the medical center. As to the remaining claims against the corporation and the medical center, we reverse the trial court's grant of summary judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is affirmed in part
and reversed in part**

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which DAVID R. FARMER, J., and WALTER C. KURTZ, SP. J., joined.

Michael D. Noel and W.H. (Steve) Stephenson, II, Nashville, Tennessee, for Appellant Sandra Turner

Thomas I. Carlton, Jr., Jay N. Chamness, and J. Cole Dowsley, Jr., Nashville, Tennessee, for Appellee Steriltek, Inc.

Erin N. Palmer, Nashville, Tennessee, for Appellees the Vanderbilt University, Herbert S. Schwartz, M.D., and Ed Glenn, M.D.

OPINION

After complaining of pain and loss of function in her left knee, in February 2002, Jessica Turner (“Jessica”) underwent arthroscopic knee surgery. She had continuing post-operative difficulties and was re-examined with a CT scan. Ultimately, Jessica was diagnosed with osteosarcoma – a type of bone cancer – of the left distal femur.

Left untreated, osteosarcoma can result in amputation of the affected limb. To avoid amputation, Jessica’s physicians scheduled her for a surgical procedure in which she would undergo a tumor resection, a total knee arthroplasty, and receive a prosthetic femur. The procedure was to be performed by Defendant/Appellee, Herbert Schwartz, M.D. (“Dr. Schwartz”), with Defendant/Appellee Ed Glenn, M.D. (“Dr. Glenn”) assisting. The surgery was to be performed at Defendant/Appellee Vanderbilt University Medical Center (“Vanderbilt”), and was scheduled for July 12, 2002. For ease of reference, Vanderbilt, Dr. Schwartz, and Dr. Glenn will be referred to collectively as “the Vanderbilt Defendants.”

Vanderbilt had contracted with Defendant/Appellee Steriltek, Inc. (“Steriltek”) to provide surgical instruments, which were sterilized off-site, to Vanderbilt. The instrument sterilization process at Steriltek is complex and involves several steps. The process begins when the instruments and batteries are brought to Steriltek’s facility and unloaded in a decontamination area. They are decontaminated and sent through a washing machine. They are then reassembled and packaged in preparation for sterilization.

The packaged instruments are first wrapped in a polypropylene wrap and sealed with a chemical indicator tape. Inside each wrap is a chemical indicator strip. Both the tape and the strip change colors to indicate exposure to the sterilant, which in this case was hydrogen peroxide gas. Immediately after the sterilization process, the chemical indicator tape that seals the wrap is observed for a change in color. In contrast, the chemical indicator strip is not observed until the wrap is opened at the point of use.

The wrapped instruments go through several sterilization cycles. During this process, the sterilization machine tracks the parameters of each cycle, indicating pressure readings and the duration of each cycle. These parameters are printed out on mechanical tape at the completion of the process.

As additional confirmation that the instruments and batteries are sterilized, Steriltek performs a biological test on each load. The biological test is performed by placing a biological test pack inside the sterilizer with the instruments. The test then determines whether the sterilant killed certain microorganisms present in the biological test pack. For a period of forty-eight hours after the

sterilization process, the biological test pack is monitored to confirm that the sterilization process was effective.

Steriltek provided the sterilization services on the instruments and batteries for Jessica's surgery. These batteries and instruments were delivered to Vanderbilt well before expiration of the 48-hour period required to confirm effective sterilization.

On the date of the surgery, July 12, 2002, Kevin Allen ("Allen"), a registered nurse and site director for Steriltek's sterilization facility, received a report that a July 10, 2002 biological test on some surgical instruments and batteries resulted in bacterial growth, indicating that the instruments and batteries in that load might not be sterile. Some of these were to go to Vanderbilt, so Allen went to Vanderbilt to retrieve the potentially-contaminated instruments. He learned that some of the instruments and batteries being used in Jessica's surgery were part of the potentially contaminated load.

Allen then advised Dr. Schwartz of the problem. At that time, Jessica's tumor resection was complete, but the other procedures had not been performed. After receiving this information, Dr. Schwartz decided to abort the surgery at that point and wait to insert the arthroplasty and prosthetic femur. In order to stabilize Jessica's knee during the interim, Dr. Schwartz had to create a cement spacer, which was impregnated with antibiotics, that he inserted to replace the part of the femur that he had already removed.

On September 20, 2002, Jessica returned to Vanderbilt for the remainder of the surgery. At that time, Dr. Schwartz successfully completed the surgical procedures originally planned. Unfortunately, at some point later, Jessica died.¹

Sandra Turner ("Plaintiff"), the mother of Jessica Turner, filed this lawsuit as Jessica's next friend and personal representative against Steriltek, Vanderbilt, Dr. Schwartz, and Dr. Glenn. The Plaintiff asserted that Dr. Schwartz and Dr. Glenn were negligent in (1) failing to make a timely determination that the surgical instruments used during Jessica's surgery were sterilized, (2) failing to take precautionary measures to ensure that sterilized instruments were used, and (3) failing to properly examine the instruments used in Jessica's surgery to make sure they were sterilized. The Plaintiff alleged that these acts or omissions by Dr. Schwartz and Dr. Glenn amounted to both ordinary negligence and medical malpractice.

The Plaintiff also claimed that Steriltek's acts or omissions amounted to negligence. The Plaintiff asserted that Steriltek was negligent in failing to provide sterilized instruments and failing to provide a timely warning that the instruments were contaminated, unsterilized, or otherwise unsafe to use in surgery.

¹The record does not include any allegation that Jessica's death was a result of any negligence or malpractice by either Steriltek or the Vanderbilt defendants.

Finally, the Plaintiff alleged that Vanderbilt was negligent in failing to employ protocols and procedures that would ensure that surgical instruments were sterilized and safe to use. The Plaintiff sought damages from all Defendants, jointly and severally, in the amount of \$200,000.

The Vanderbilt Defendants and Steriltek filed separate motions for summary judgment. The Vanderbilt Defendants' motion was accompanied by an expert affidavit from Dr. Schwartz. In his affidavit, Dr. Schwartz opined that he, Dr. Glenn, and Vanderbilt provided medical care to Jessica in a manner that complied with the recognized standard of care in Nashville, that all three acted with ordinary and reasonable care in treating her, and that they were not the proximate cause of any damages she sustained. The Vanderbilt Defendants asserted that they were entitled to judgment as a matter of law, based on Dr. Schwartz's affidavit and the Plaintiff's failure to put forth competent expert proof as required by Tennessee's Medical Malpractice Act, Tennessee Code Annotated § 29-26-115, *et seq.*

Steriltek filed its motion for summary judgment, along with the affidavit of Allen as an expert on Steriltek's sterilization processes. In his affidavit, Allen opined that the instruments used in Jessica's surgery were properly sterilized and that the biological test had actually resulted in a "false positive." In its motion, Steriltek argued that the subject matter of its case was so complex that the Plaintiff's lawsuit could not survive the summary judgment motions without providing expert proof in response to them.

The Plaintiff filed responses to the motions for summary judgment filed by the Vanderbilt Defendants and by Steriltek, but did not submit any expert proof. As to the Vanderbilt Defendants, the Plaintiff simply denied the assertion that Dr. Schwartz, Dr. Glenn, and the other Vanderbilt employees complied with the applicable standard of care. The Plaintiff maintained that summary judgment was inappropriate because the following facts were disputed: (1) whether the instruments used during Jessica's surgery were properly sterilized, (2) whether the Vanderbilt Defendants acted in accordance with the recognized standard of care, and (3) whether the instruments were the proximate cause of any injury to Jessica. In response to Steriltek's summary judgment motion, the Plaintiff maintained that no expert proof was required of her because the issue of whether Steriltek had breached its duty to the Plaintiff was within the common knowledge of laypersons.

Without elaborating on its reasoning, the trial court granted the summary judgment motions filed by both Steriltek and the Vanderbilt Defendants. The Plaintiff now appeals those rulings.

Our review of the trial court's grant of the motion for summary judgment is *de novo* on the record before this Court with no presumption of correctness. **Warren v. Estate of Kirk**, 954 S.W.2d 722, 723 (Tenn. 1997). The party seeking summary judgment must demonstrate that there is no genuine dispute as to any material fact. **McCarley v. West Quality Food Serv.**, 960 S.W.2d 585, 588 (Tenn. 1998) (citing **Byrd v. Hall**, 847 S.W.2d 208, 214 (Tenn. 1993)). The moving party must also either affirmatively negate one of the essential elements of the opposing party's claim or establish an affirmative defense to that claim. **Id.** If the moving party fails to demonstrate the absence of a genuine dispute of fact and negate an essential element of the opposing party's claim, then the non-moving party need not support its claim with affidavits or discovery materials to survive summary judgment. **Id.** If, on the other hand, the moving party shows the absence of genuine disputed

material facts and negates an essential element of the opposing party's claim, then the non-moving party must show that disputed issues of material fact still remain or establish that the negated element of his claim still exists. *Id.*

The Plaintiff asserts on appeal that she was not required to submit expert proof in response to the expert affidavits submitted in support of the summary judgment motions. As set forth below, this may depend on the nature of the Plaintiff's claims.

Generally, Tennessee's Medical Malpractice Act requires the plaintiff to provide expert proof to establish the elements of a medical malpractice claim. T.C.A. § 29-26-115 (2000). If the defendant files a motion for summary judgment supported by competent expert proof that no medical malpractice occurred, and the plaintiff does not present expert proof to the contrary, then summary judgment for the defendant is necessary. *Patterson v. Arif*, 173 S.W.3d 8, 12-13 (Tenn. Ct. App. 2005). If, however, the alleged malpractice is so obvious that it is within the common knowledge of a layperson, then the plaintiff need not submit expert proof. *Runnells v. Rogers*, 596 S.W.2d 87, 89-90 (Tenn. 1980). If the plaintiff alleges ordinary negligence, as opposed to medical malpractice, the plaintiff is not required to comply with the requirements of the Medical Malpractice Act. Even if the plaintiff's claim sounds in mere negligence, however, she may be required to submit expert proof of her claim. *See Lawrence County Bank v. Riddle*, 621 S.W.2d 735, 737 (Tenn. 1981) (citing *Casone v. State*, 246 S.W.3d 22, 26 (1952)).

This Court has previously discussed the difference between ordinary negligence and medical malpractice:

The distinction between ordinary negligence and [medical] malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring specialized skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of common everyday experience of the trier of fact.

Peete v. Shelby County Health Care Corp., 938 S.W.2d 693, 696 (Tenn. Ct. App. 1997) (quoting *Graniger v. Methodist Hosp. Healthcare Sys., Inc.*, No. 02A01-9309-CV-00201, 1994 WL 496781 (Tenn. Ct. App. Sept. 9, 1994)). Also, in comparing medical malpractice with ordinary negligence, we consider whether the defendant's acts or omissions relate to a particular patient or to an entire group of persons. *See Estate of Doe v. Vanderbilt Univ., Inc.*, 958 S.W.2d 117, 121 (Tenn. Ct. App. 1996) (concluding that a medical center's decision not to implement a policy to notify an entire group of former patients that they may have contracted HIV from blood transfusions constituted ordinary negligence, not medical malpractice).

In light of this standard, we must examine in detail the Plaintiff's claims against each Defendant and determine whether the nature of the claim required expert proof. We then look at each Defendant's motion for summary judgment and supporting expert proof to determine if the trial court erred in granting summary judgment as to that Defendant.

We consider first the Plaintiff's claims against Dr. Schwartz and Dr. Glenn. The Plaintiff claimed that Drs. Schwartz and Glenn were negligent and failed to perform in accordance with the recognized standard of "acceptable professional practice" by failing to assure—or make certain that others ensured—that the instrumentation used during Jessica's surgery was clean, sterile, and safe and suitable to use for surgery. In support of their motion for summary judgment, the Vanderbilt Defendants filed the affidavit of Dr. Schwartz. In his affidavit, Dr. Schwartz stated that he was familiar with the "recognized standard of acceptable professional practice in the specialty of orthopaedics" in Nashville in 2002 with respect to the care of a patient with Jessica's condition. He outlined the course of events with respect to Jessica's treatment and the decision to abort her surgery, and asserted that he, Dr. Glenn, and Vanderbilt complied with the applicable standard and acted with ordinary and reasonable care.

Both parties filed statements of undisputed fact; the Plaintiff cited Dr. Schwartz's deposition testimony in which he asserted that it was not his responsibility to personally verify the sterility of the surgical instruments. The Vanderbilt Defendants noted that Dr. Schwartz testified that the sterilization of the surgical instruments took place off-site, and the instruments are then delivered to the operating room in sealed pans. The Plaintiff submitted no expert proof.

Clearly, the Plaintiff's claims as to Drs. Schwartz and Glenn sound in medical malpractice; these physicians exercised their medical judgment in deciding which instruments to use, and in making the decision to abort Jessica's surgery.² Their decisions related only to Jessica's care, not to an entire group of patients or persons. *See Peete*, 938 S.W.2d at 696; *Estate of Doe*, 958 S.W.2d at 121. Dr. Schwartz's testimony made it clear that the physician does not have the responsibility of sterilizing the instruments; rather, the instruments are provided at the operating room already sterilized, in sealed containers.

Dr. Schwartz and Dr. Glenn produced competent expert proof, in the form of Dr. Schwartz's affidavit and his deposition testimony, that they provided Jessica with medical care in a manner that complied with the applicable standard of care, negating the essential elements of the Plaintiff's medical malpractice claim and establishing that there were no genuine disputes as to any material facts.³ The Plaintiff failed to provide contradictory expert proof in response and therefore failed to establish a genuine issue of material fact as to the elements of her claim.⁴ Accordingly, summary

²The Plaintiff does not appear to question Dr. Schwartz's decision to abort Jessica's surgery in light of the information he received on the possible contamination of the batteries or instruments used in the surgery.

³The Plaintiff insists that the parties remain in dispute over the issue of whether the instruments were actually sterilized; Dr. Schwartz and Dr. Glenn do not clearly dispute the Plaintiff on that issue. However, Dr. Schwartz's testimony established that the physicians did not sterilize the instruments and were not primarily responsible for ensuring that they were sterilized, and that they aborted Jessica's surgery as soon as they learned there was a possibility of contamination. Thus, whether the instruments were actually contaminated does not appear to be a material fact as to Drs. Schwartz and Glenn.

⁴Any alleged malpractice by Drs. Schwartz and Glenn would not be so obvious as to be within the common knowledge of lay persons; thus, expert proof from the Plaintiff would be necessary. *See Runnells*, 596 S.W. 2d at 89-

judgment was proper as to Dr. Schwartz and Dr. Glenn. *See* Tenn. R. Civ. P. 56.04 (2006); *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998).

As to Vanderbilt, the Plaintiff first alleges that Vanderbilt is vicariously liable for the actions of Drs. Schwartz and Glenn. Insofar as the Plaintiff's claims are based on vicarious liability, summary judgment in favor of Vanderbilt was not erroneous, for the reasons set forth above.

Vanderbilt contends on appeal that all of the Plaintiff's claims against it are medical malpractice claims, properly dismissed in light of the Plaintiff's failure to proffer expert proof. Certainly this assertion is true as to the claims based on vicarious liability. The Plaintiff also alleges, however, that Vanderbilt "negligently failed to have in place a system of proper surgical protocols, procedures, and measures to assure that surgical instrumentation was clean, sterile, and in a safe condition" The Plaintiff argues that this claim alleges ordinary negligence, not medical malpractice, contending that "[i]f Vanderbilt had the protocol or standard procedure simply to wait 48 hours from the time the batteries [and instruments] were sterilized before [they were] used in surgery, Jessica Turner would not have had to undergo an additional and needless second surgery." Vanderbilt does not address this claim directly, but simply maintains that all of the allegations against all of the Vanderbilt Defendants are medical malpractice claims.

A similar issue was discussed at length in *Estate of Doe v. Vanderbilt University, Inc.*, 958 S.W.2d 117 (Tenn. Ct. App. 1997). In *Estate of Doe*, the plaintiff's decedent had surgery at Vanderbilt. *Estate of Doe*, 958 S.W.2d at 118. In the course of the surgery, she had a blood transfusion, and received blood contaminated by HIV. *Id.* As a result, the patient became infected with HIV and transmitted the disease to her daughter in utero. *Id.* Both subsequently died of AIDS. *Id.* The plaintiff then sued Vanderbilt for damages based on Vanderbilt's failure to notify patients who had received blood transfusions that the blood they received had not been tested for HIV. *Id.*

Vanderbilt filed a motion for summary judgment supported by expert testimony opining that Vanderbilt's notification policy was reasonable and in accord with the policies of other hospitals in Nashville under similar circumstances. *Id.* at 118-19. In response, the plaintiffs submitted expert testimony from California experts, opining that Vanderbilt's notification policy was unreasonable, and asserting that the decision on notification was an administrative decision, not a medical one. *Id.* at 119. The trial court held that the plaintiff's claims were subject to Tennessee's Medical Malpractice Act, and, because the expert testimony proffered by the plaintiffs did not comply with the Act, granted summary judgment in favor of Vanderbilt. *Id.* at 118. The plaintiffs appealed, arguing that their claims against Vanderbilt were claims of ordinary negligence, not medical malpractice, and that summary judgment was granted in error.

The appellate court in *Estate of Doe* first noted that the term " 'medical malpractice' does not encompass every negligence action brought against a health care provider." *Id.* at 120. The court compared its case to a New York case in which the plaintiff sued a hospital, asserting that the

⁴(...continued)

hospital failed to safeguard its blood supply from HIV contamination. *Id.* at 121 (citing *Weiner v. Lenox Hill Hosp.*, 673 N.E.2d 914, 915 (N.Y. 1996)). The *Estate of Doe* court quoted *Weiner*’s analysis of whether the plaintiff’s claims involved medical malpractice:

The court began by acknowledging that not every act of negligence toward a patient is medical malpractice Seeking to determine whether the challenged conduct constituted medical treatment, the court concluded that “[t]he core issue in this case – the adequacy of the Hospital’s blood testing and screening procedures – does not implicate questions of medical competence . . . but instead turns on the Hospital’s independent duties as a blood collection center.” . . . The court clarified that “[t]he need for expert testimony signifies only that the technical and scientific nature of the blood-collection process is beyond the ken of the average juror, not that the claim sounds in medical malpractice.”

Id. (internal citations omitted). Thus, the *Weiner* court noted that the conduct at issue—the defendant hospital’s procedures for safeguarding the blood supply—did not involve medical competence and the treatment of a particular patient, but rather involved the hospital’s function as a blood collection center for all of its patients. *Id.*

Relying on the *Weiner* court’s analysis, the *Estate of Doe* court considered the plaintiff’s claims against Vanderbilt. In establishing its notification policy, the court said, the three physicians who made a recommendation to Vanderbilt

[E]xplored the issue from a medical risk/benefit perspective. They drew their conclusion not by assessing the risks and benefits to any particular person but by making this assessment with regard to the entire group of those who had received blood transfusions . . . [and] determined that the risks outweighed the benefit to the group at large.

Id. The court found it “significant that this was a decision to or not to notify, not to diagnose or to treat.” *Id.* at 122. It also noted that, at the time Vanderbilt made the decision on notification, there was no longer a physician-patient relationship between Ms. Doe and the Vanderbilt physician. *Id.*

In light of all of these factors, the *Estate of Doe* court concluded that the plaintiff’s claim was not medical malpractice. *Id.* The court acknowledged that medical expert testimony would be “important” for a jury to determine the issue, but stated that “the need for expert testimony does not always signify medical malpractice.” *Id.* at 123. Therefore, the appellate court in *Estate of Doe* reversed the trial court’s grant of summary judgment, holding that it erred in requiring the plaintiff’s expert proof to comply with Tennessee’s Medical Malpractice Act. *Id.*

Keeping in mind the analysis in *Weiner*, relied on in *Doe*, we now turn to the Plaintiff’s claims against Vanderbilt in the case at bar. Certainly, Vanderbilt’s allegedly negligent act or omission relates to an aspect of medical care: the provision of sterile batteries and instruments for surgery. The effects of Vanderbilt’s decision to put sterilized instruments into circulation before expiration of the 48-hour biological test period are felt by the patient at the time of the treatment,

when Vanderbilt has an existing relationship with the patient. In addition, medical expert testimony may be important for a jury to determine whether Vanderbilt was negligent in not having a policy of waiting forty-eight hours to make sterilized batteries and instruments available for surgery, to ensure that they were not contaminated. However, as in *Weiner* and *Estate of Doe*, the decision at issue is not made when the patient is being treated at the hospital; similar to *Weiner*, the policy decision as to how soon to use freshly sterilized instruments was made well before Jessica was a Vanderbilt patient. Moreover, Vanderbilt's decision is not one of medical diagnosis or treatment. It does not involve assessment of the risks or benefits to Jessica in particular, but rather to the entire group of patients facing surgery at Vanderbilt. It affects every Vanderbilt surgical patient, regardless of his or her condition, similar to Vanderbilt's duty to provide clean surgical linens or a clean operating table. In this sense, the issue does not appear to "implicate questions of medical competence . . . but instead turns on the Hospital's independent duties as a" surgical center. *Estate of Doe*, 958 S.W.2d at 121. All in all, we must conclude that the Plaintiff's complaint against Vanderbilt states a claim of ordinary negligence, not medical malpractice.

This does not end our analysis of the trial court's grant of summary judgment in favor of Vanderbilt. The motion for summary judgment filed by the Vanderbilt Defendants was, of course, supported by expert proof: the affidavit of Dr. Schwartz. We must determine, then, whether the summary judgment motion and the accompanying expert proof necessitated rebuttal expert proof from the Plaintiff as to Vanderbilt.

Dr. Schwartz's affidavit states his expertise in orthopaedics and his familiarity with the standard of care in that medical specialty. He addresses any assertion of medical malpractice, and generally asserts as well that he, Dr. Glenn, and Vanderbilt acted with ordinary and reasonable care.

Dr. Schwartz does not hold himself out as an expert in either the sterilization of surgical instruments or the operation of a hospital surgical center such as Vanderbilt. In his deposition testimony, Dr. Schwartz freely admits his lack of expertise in these areas and indicates that, to his knowledge, the batteries and instruments simply arrive at the operating room in sealed containers. Thus, Dr. Schwartz's affidavit does not demonstrate the knowledge or credentials to address the Plaintiff's allegations that Vanderbilt did not have in place a system of protocols, procedures, and measures to assure that surgical instrumentation was clean, sterile, and safe for use. Likewise, Vanderbilt's motion for summary judgment does not address this allegation.⁵ Because Vanderbilt provided no evidence on the issue of the adequacy of its procedures for providing sterilized instruments, Vanderbilt failed to establish the absence of a genuine dispute on this material fact. Therefore, summary judgment in favor of Vanderbilt on this claim was improper.⁶ *See* Tenn. R.

⁵Even Vanderbilt's appellate brief does not address this claim by the Plaintiff, except to maintain in general that all of the Plaintiff's claims against all of the Vanderbilt Defendants sound in medical malpractice, not ordinary negligence, and thus required expert proof.

⁶The Plaintiff argues on appeal that the affidavit of Steriltek employee Kevin Allen is sufficient to support the Plaintiff's claim that Vanderbilt was negligent in failing to implement a 48-hour interval before surgical instruments and batteries are made available for surgery. This holding preterms this issue in this appeal.

Civ. P. 56.04 (2006); *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998); *see also* Robert Banks, Jr. & June F. Entman, *Tennessee Civil Procedure* § 9-4(q) (2d ed. 2004).

We must next consider the Plaintiff's claims against Steriltek. In the complaint, the Plaintiff asserts that Steriltek negligently failed "to provide safe and uncontaminated instrumentation," and failed "to warn, prior to the surgical procedure, that the equipment and/or instrumentation was contaminated, unsterilized and unsafe to use." In support of its motion for summary judgment, Steriltek filed the affidavit of Kevin Allen, a registered nurse and the site director for Steriltek's sterilization facility. Allen's affidavit indicated his knowledge of Steriltek's sterilization process, outlined the steps used in sterilizing instruments, and set forth the facts surrounding Jessica's surgery. He stated his expert opinion that the instruments used in Jessica's surgery were in fact properly sterilized and that the biological test result was a false positive. The Plaintiff filed a response to the motion but did not produce expert proof to rebut Allen's affidavit. The parties agree that the Plaintiff's claims against Steriltek are not medical malpractice claims subject to Tennessee's Medical Malpractice Act. On appeal, the Plaintiff argues that the trial court erred in granting Steriltek's motion because the issue of whether the instruments were in fact properly sterilized remains in dispute. The Plaintiff also contends that the evidence shows that Steriltek generally returns freshly sterilized surgical equipment within four to six hours, and did not warn Vanderbilt that the instruments would not be safe to use until the 48-hour biological test had been completed.

First, we consider the issue of whether the instruments were properly sterilized, and whether the Plaintiff was required to submit expert testimony on this issue. Our Supreme Court has stated, "Whether or not expert testimony is necessary is generally determined by the subject matter of the inquiry before the Court." *Kinley v. Tenn. State Mut. Ins. Co. Inc.*, 620 S.W.2d 79, 81 (Tenn. 1981). To require expert testimony, "the subject of expertise must be one that would not be comprehensible to jurors without the aid of an expert witness." *Lawrence County Bank v. Riddle*, 621 S.W.2d 735, 737 (Tenn. 1981) (quoting Paine, *Tennessee Law of Evidence* § 174). From Allen's affidavit, it is clear that the process of sterilizing surgical instruments is complex indeed, involving interactions between chemicals and biological agents and between chemicals and surgical materials, complicated machinery, and chemical-sensing synthetic materials. It was certainly appropriate for the trial court to determine that, in order to rebut Steriltek's motion and supporting expert testimony on this issue, the Plaintiff was required to proffer expert testimony. Steriltek submitted expert proof that, despite the biological "grow-out" test that prompted Dr. Schwartz's decision to abort Jessica's surgery, the batteries and instruments were in fact sterile and the biological test produced a "false positive" result. The Plaintiff refused to concede this point, but offered no expert proof to the contrary. Summary judgment in favor of Steriltek on this issue was proper.

The Plaintiff also asserted in her complaint that Steriltek was negligent in failing to warn that the batteries and instruments used in Jessica's surgery were contaminated, unsterile, and unsafe to use. As noted above, Steriltek's motion for summary judgment and the supporting affidavit fully addressed the sterilization issue; however, neither addressed the alleged failure to warn. The Plaintiff alleges that it would be necessary to have a 48-hour waiting period between sterilization of the batteries and instruments and use of the batteries and instruments to allow time to see the results of the biological test pack. Steriltek's failure to provide a warning that the 48-hour test period

had not elapsed may be actionable despite appropriate sterilization. That is, regardless of whether the instruments and batteries were properly sterilized, the Plaintiff's alleged injury occurred as a result of the interruption of Jessica's surgery. Accordingly, Steriltek's showing that the batteries and instruments were in fact properly sterilized does not abrogate the Plaintiff's claim that Steriltek breached a duty to warn that the instruments and batteries were unsafe to use prior to the expiration of the 48-hour biological test period.⁷

The trial court's grant of Steriltek's motion for summary judgment was therefore in error insofar as it dismissed the Plaintiff's claim that Steriltek was negligent in failing to warn that the instruments and batteries may have been unsafe to use.

The Plaintiff also contends in her complaint that Steriltek breached its contract with Vanderbilt to provide sterilized surgical instruments, and that the Plaintiff is a third-party beneficiary of that agreement, and consequently asserts a cause of action against Steriltek based on the alleged breach.

As an exhibit to its motion for summary judgment, Steriltek produced a portion of the contract between Steriltek and Vanderbilt. The contract states that it will "inure to the benefit of and be binding upon the parties hereto and successors or assigns of the parties hereto" From this language, Steriltek argued that the Plaintiff had not shown that Jessica was an *intended* third-party beneficiary of the contract between Vanderbilt and Steriltek, in that the language in the contract did not show a "clear intent" to "operate for the benefit of a third party." *See First Tenn. Bank Nat'l Ass'n v. Thoroughbred Motor Cars, Inc.*, 932 S.W.2d 928, 930 (Tenn. Ct. App. 1996) (citing *United Am. Bank of Memphis v. Gardner*, 706 S.W.2d 639, 641 (Tenn. Ct. App. 1985)).

In the Plaintiff's memorandum opposing the Steriltek motion for summary judgment, she neither addressed her breach of contract claim nor produced evidence, by the language in the contract or otherwise, that she was an intended third-party beneficiary of the agreement. Under these circumstances, we must conclude that Steriltek's motion for summary judgment as to the breach of contract claim was properly granted. *See* Tenn. R. Civ. P. 56.06 (2006).

To summarize, the grant of summary judgment in favor of Dr. Schwartz and Dr. Glenn is affirmed. The grant of summary judgment in favor of Vanderbilt on the Plaintiff's claim that Vanderbilt is vicariously liable for the medical malpractice of Drs. Schwartz or Glenn is also affirmed. The grant of summary judgment on the Plaintiff's remaining claims against Vanderbilt is reversed. As to Steriltek, the grant of summary judgment is affirmed on the Plaintiff's claim that the surgical batteries and instruments were not sterilized, and on the Plaintiff's claim as a third-party beneficiary of the contract between Steriltek and Vanderbilt. As to the Plaintiff's remaining claims against Steriltek, the grant of summary judgment is reversed.

⁷There may be an issue as to whether Steriltek had such a duty. We express no opinion on this issue, because it was not raised in Steriltek's motion for summary judgment and likewise was not raised in this appeal.

Costs of this appeal are to be taxed one-half to Appellees, Steriltek, Inc., The Vanderbilt University d/b/a Vanderbilt University Medical Center, Herbert S. Schwartz, M.D., and Ed Glenn, M.D., and one-half to Appellant, Sandra Yevette Turner, as next friend, next of kin, natural mother and personal representative of Jessica Jovan Turner, for which execution may issue, if necessary.

HOLLY M. KIRBY, JUDGE